IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

Ex.SA.No. 15 of 2005()

AS.34/1994 & 46 of I ADDL. DISTRICT COURT, THIRUVANANTHAPURAM
OS.133/1968 of II ADDL.M.C.,THIRUVANANTHAPURAM
(EA 45/1981)
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: APPELLANT/5TH RESPONDENT/OBSTRUCTOR:

K. SANKARAYA IYER,
T.C.34/286, RAMA SWAMY KOVIL STREET,
FORT, THIRUVANANTHAPURAM.

BY ADV. SRI.M.RAJASEKHARAN NAYAR
SMT.K.N.RAJANI
SMT.NITHYA.K.
SMT.MANJUSHA MOHANDAS

RESPONDENTS: DECREE HOLDERS:

1. N.S. NARAYANA IYER, T.C.34/67,
RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

2. SARADA AMMAL, T.C.34/67,
RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

3. BHAGAVATHY AMMAL, T.C.34/67,
RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

4. L. SANKARANARAYANA IYER,
T.C.34/67, RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

5. L. KRISHNAMOORTHY, T.C.34/67,
RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

6. L. VENKITESWARAN, T.C.34/67,

RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

7. B. GNAMBAL, T.C.34/67,
RAMASWAMY COVIL ROAD, FORT, THIRUVANANTHAPURAM.

8. L.SUBRAMONIAN, T.C.34/67, RAMASWAMY COVIL ROAD
FORT, THIRUVANANTHAPURAM.

9. RAJY,T.C.34/67,RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

10. VIJAYALEKSHMI, T.C.34/67, RAMASWAMY COVIL ROAD, FORT,
THIRUVANANTHAPURAM.

11. N.HARIHARASHARMA, T.C.28/1961, RAMASWAMY COVIL ROAD
FORT, THIRUVANANTHAPURAM.

BY ADV. SRIK.B.PRADEEP -CAVEATOR

THIS EXECUTION SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.486/07, 1068/06 & 2001/05 IN EX.S.A.15/2005

4.10.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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Ex.S.A. NO. 15 OF 2005

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Dated this the 4th day of October, 2007

JUDGMENT

Appellant is the fifth respondent in E.A.45/1991 in O.S.133/1968 on the file of Additional Munsiff Court, Thiruvananthapuram. O.S.133/1968 was filed by Lekshmi Ammal Saraswathi Ammal for other co-owners also for redemption of mortgage dated 27.7.1960. The original mortgagee was Krishna Iyer Mahadeva Iyer first defendant in the suit. The suit was decreed on 17.7.1972. Decree holder filed E.P.33/1972. The first judgment debtor claimed tenancy right under Kerala Land Reforms Act. It was contended that question of tenancy is to be referred to the Land Tribunal. Petition was dismissed on 6.10.1972. The order was challenged before District Court, Thiruvananthapuram in A.S.758/1972. When the appeal was pending, judgment debtor filed an application in the appeal claiming kudikidappu.

District Judge as per order dated 9.3.1973 remanded the matter to the executing court to consider the claim for kudikidappu. Executing court appointed a Commission to find out whether the building is part of a building to decide whether plea of kudikidappu will stand. On receipt of the report by the Commissioner, as per order dated 6.7.1974 claim for kudikidappu was rejected. First judgment debtor challenged that order before District Court, Thiruvananthapuram in A.S.413/1974. District Judge as per order dated 10.9.1974 again remanded the matter to the executing court. Executing court once again appointed another Commission. On receipt of the report of the Commissioner, executing court upheld the claim for kudikidappu and dismissed the E.P on 4.1.1978. It was challenged before this court in C.R.P. 1577/1978. It was contended by the decree holder before this court that the original mortgage deed establish that the building is only part of a building and therefore the plea of kudikidappu will

not stand in view of the Full Bench decision of this court in **Muhammad v. Imbichibi (1974 K.L.T. 738).** This court as per order dated 8.9.1980 allowed the C.R.P and held that plea of kudikidappu will not stand. This court held:-

> "There is some substance in the contention of the learned counsel for the revision petitioner. At the time when Ext.B1 mortgage was executed in 1960 it cannot be said that the (4th page begins) building involved in the mortgage was a separate building. Going by the facts and circumstances brought out in the case it was only part of a building, the other part

> of which is now having door number 285. In that case, by no stretch of imagination it can be said that the building involved in Ext.B1 mortgage which is now in the possession of the judgment-debtors is a separate building. If it is not a separate building it goes without saying that the judgment debtors cannot claim kudikidappu rights."

Thereafter when delivery was ordered, it was obstructed by the mother of first judgment debtor. She raised a contention that she is entitled to kudikidappu right. E.A.1085/1981 was filed by the obstructor to refer the claim for kudikidappu to Land Tribunal under section 125(3) of Kerala Land

Reforms Act. The executing court dismissed the application holding that in view of Rule 101 of Order XXI, claim for tenancy raised in an application under Rule 97 of Order XXI is not be referred to the Land Tribunal and is to be decided by the executing court itself. The obstructor challenged that order before this Court in C.R.P.589/1982. Though it was brought to the notice of this court that in C.R.P.1577/1978 the claim for kudikidappu raised by the first judgment debtor was rejected, this court did not consider that question. Instead the only question decided was whether provisions of Rule 101 of Order XX1 will enable executing court to decide the question of tenancy without a reference under section 125 (3) of Kerala Land Reforms Act. This court following the Full Bench decision in Kesava Bhat v. Subraya Bhat (1979 KLT 766) held that if any question which requires to be settled, decided or dealt with or to be determined by the Land Tribunal or the Appellate Authority or the Land Board or the

Taluk Land Board or the Government arises, then under section 125(3) of Kerala Land Reforms Act the case has to be referred to the Land Tribunal and executing court is therefore bound to refer the claim for kudikidappu to the Land Tribunal. The question whether the earlier order in C.R.P. 1577/1978 would enable the obstructor to claim kudikidappu was not considered. The executing court was directed to decide the application filed by the obstructor in accordance with law.

2. The executing court thereafter referred the claim of kudikidappu to Land Tribunal. The Land Tribunal entered a finding that the obstructor is entitled to the benefit of kudikidappu. The executing court accepted the findings as it is binding on that court. But by mistake it allowed E.A.1085/1981 and did not pass any order in E.A.45/1981. The decree holder filed A.S.2/1985 challenging that order, as the order shows that finding of the Land Tribunal was accepted though E.A.45/1981 was not allowed. First appellate court

dismissed the appeal holding that as no final order was passed in E.A.45/1981, remedy of the decree holder is to get an order in that application and if it is against her challenge the same in appeal. Thereafter executing court as per order dated 12.10.1993 though accepted the finding of the Land Tribunal and allowed E.A.45/1981. In view of the finding of the Land Tribunal E.A.45/1981, the application filed under Rule 97 of Order XX1 to remove the obstruction could only be dismissed. Eventhough technically E.A.45/1981 was allowed the decree holder challenged that order in A.S.34/1994. As by that time the obstructor died, one of the legal heirs of the obstructor, the appellant herein, filed A.S.46/1994 before Additional District Court, Thiruvananthapuram. Learned Additional District Judge heard both appeals together. Finding that this court in C.R.P.1577/1978 has already found that the building of over kudikidappu right was claimed is part of the building, learned District Judge held that

appellant is not entitled to get kudikidappu right. A.S.34/1994 was allowed and the obstruction caused was directed to be removed and A.S.46/1994 was dismissed. Appellant challenged that order in the second appeal.

3. As notice was issued before admission, only the legal heirs of deceased decree holder 11th respondent appeared through Advocate Sri.K.B. Pradeep. Learned counsel appearing for the appellant and 11th respondent were heard.

4. The argument of learned counsel appearing for appellant is that in view of the order in C.R.P.589/1982, which was subsequent to the earlier order in C.R.P.1577/1978, first appellate court should not have relied on the earlier decision in C.R.P.1577/1978 and rejected the claim for kudikidappu upheld by the executing court. It was argued that report of the Commissioner submitted before the executing court establish that the building is not a part of a building, but a separate building by itself and therefore the claim

for kudikidappu cannot be rejected on the ground that it is part of a building. Learned counsel appearing for 11th respondent submitted that whether the building is a part of the building or not was finally settled in C.R.P.1577/1978 and in C.R.P.589/1982 that question was not considered and the only question considered in that C.R.P was whether Rule 101 of Order XX1 of Code of Civil Procedure override the provisions of Section 125(3) of Kerala Land Reforms Act and no substantial question of law is involved in the appeal.

5. It is not disputed that if the building is part of a building, the plea for kudikidappu will not stand in view of the Full bench decision of this Court in Mohammad's case (supra). There is no doubt on that position. The original mortgage deed establishes that the building is only part of a building. Though learned counsel appearing for appellant argued that the report submitted by the Commissioner shows that the building is not part of a building but an independent building, copy of

the report made available establish that the argument is not correct. From a reading of the report, it is asbolutely clear that the building is only a part of the building and not an independent building. It is for this very reason this court in C.R.P.1577/1978 finding that the building is only part of the building, rejected the claim for kudikidappu raised by first judgment debtor. In view of that finding, when the mother of first judgment debtor claimed kudikidappu right, it is not possible to take a contrary view and hold that it is an independent building and not part of a building. As rightly found by the courts below, when the building is part of a building, the plea of kudikidappu will not stand. Hence no substantial question of law is involved in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006